SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2017 0036

NATHAN AKOKA — Applicant

v

THE QUEEN — Respondent

JUDGES:	WARREN CJ, KYROU and REDLICH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	28 July 2017
DATE OF JUDGMENT:	25 August 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 214
JUDGMENT APPEALED FROM:	*DPP v Akoka* (Unreported, County Court of Victoria, Judge Chettle, 10 February 2017)

CRIMINAL LAW – Appeal – Sentence – Robbery, aggravated burglary, trafficking drug of dependence – 12 months spent in residential rehabilitation facility prior to sentence – Evidence of rehabilitation – Plea of guilty – Total effective sentence six years' imprisonment – Non-parole period three years – Whether manifestly excessive – Mercy, how it may inform sentencing range – Whether error in approach to discretion to exercise mercy – Whether mercy conflated with principles in *Boulton v The Queen* (2014) 46 VR 308 – No error disclosed – *R v Osenkowski* (1982) 30 SASR 212; *El Achkar v The Queen* [2016] VSCA 209 considered.

CRIMINAL LAW – Appeal – Sentence – Whether failure to moderate sentence on account of time spent in residential rehabilitation facility – Appeal allowed – Resentenced to total effective sentence five years' imprisonment – Non-parole period two years and six months – *R v Delaney* (2003) 59 NSWLR 1; *Renshaw v The Queen* [2012] NSWCCA 91; *R v Eyles (No 3)* [2017] ACTSC 1 followed.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr O P Holdenson QC	Furstenberg Law
For the Crown	Mr B Kissane QC	J Cain, Solicitor for Public Prosecutions

WARREN CJ
KYROU JA
REDLICH JA:

Introduction and summary

1 The applicant pleaded guilty to 10 charges on two indictments. Following a plea hearing on 7 and 10 February 2017, he was sentenced by a County Court judge on 10 February 2017 as follows:[1]

2 Indictment F12535371	**3 Offence**	**4 Maximum**	**5 Sentence**	**6 Cumulation**
7	8 Armed robbery 9 *Crimes Act 1958* s 75A(1)	10 25 years	11 18 months	12 Base
13 14	15 Theft 16 *Crimes Act 1958* s 74(1)	17 10 years	18 12 months	19 6 months
20	21 Make threat to kill 22 *Crimes Act 1958* s 20	23 10 years	24 6 months	25 -
26	27 Obtain financial advantage by deception 28 *Crimes Act 1958* s 82(1)	29 10 years	30 7 days	31 -
32 Total Effective Sentence Indictment F12535371:		33 2 years		
34 **Other relevant orders:** 12 months of the sentence on this indictment be served cumulatively upon the sentence on indictment G10077355.1.				

35 Indictment G10077355.1	**36 Offence**	**37 Maximum**	**38 Sentence**	**39 Cumulation**

[1] *DPP v Akoka* (Unreported, County Court of Victoria, Judge Chettle) 10 February 2017 ('Sentencing remarks').

40	41 Trafficking in a drug of dependence 42 *Drugs, Poisons and Controlled Substances Act 1981* s 71AC	43 15 years	44 18 months	45 9 months
46	47 Aggravated burglary 48 *Crimes Act 1958* s 77(1)	49 25 years	50 4 years	51 Base
52	53 Make threat to inflict serious injury 54 *Crimes Act 1958* s 21	55 5 years	56 9 months	57 3 months
58	59 Theft	60 10 years	61 6 months	62 -
63	64 Obtain financial advantage by deception	65 10 years	66 1 month	67 -

68 Indictment G10077355.1 (cont.)	**69 Offence**	**70 Maximum**	**71 Sentence**	**72 Cumulation**
73	74 Handle stolen goods 75 *Crimes Act 1958* s 88	76 15 years	77 3 months	78 -
79 Total Effective Sentence Indictment G10077355.1		80 5 years		

81 Total Effective Sentence (both indictments):	82 6 years
83 Non-Parole Period:	84 3 years
85 Pre-Sentence detention:	86 35 days[2]
87 **6AAA Statement:** Total effective sentence of 8 years with a non-parole period of 5	

[2] It is common ground that this period is erroneous and that the correct period is 40 days. As will become apparent, it is not necessary for this Court to correct the judge's error.

years

88 The applicant seeks leave to appeal his sentence on the grounds that the judge erred in: sentencing him on the basis that the discretion to exercise mercy was not available; failing to take into account as a form of pre-sentence detention a period of 12 months the applicant spent at a residential rehabilitation facility; and imposing sentences that were manifestly excessive.

89 For convenience, we will refer to indictment F12535371 as the 'first indictment' and the charges the subject of it as the 'first indictment charges'. We will also refer to indictment G10077355.1 as the 'second indictment' and the charges the subject of it as the 'second indictment charges'.

90 For the reasons that follow, the application for leave to appeal will be granted, the appeal will be allowed and the applicant will be resentenced as set out at [209] below.

Circumstances of the offending

Offending the subject of the first indictment

91 On 10 June 2015, while the applicant was on bail awaiting trial for the offences referred to at [118] below and was serving the community correction order ('CCO') referred to at [116] below, he attended a flat in St Kilda where his acquaintance, Mr Turner, lived. The flat had three bedrooms and three tenants: Mr Turner, a 20 year old male student, Mr Dwyer, and a 20 year old female student, Ms Rombauts. Mr Dwyer and Ms Rombauts were not known to the applicant.

92 Mr Dwyer was in the flat on his own when the applicant knocked on the door at about 9.15 pm, armed with an extendible baton. When the applicant was informed that Mr Turner was absent, he said that he would wait inside for Mr Turner and entered the flat. The applicant went into Mr Turner's room and started to take items from it and put them in a blue sports bag. Mr Dwyer asked him what he was doing and

suggested that it might be better if the applicant left the flat and waited for Mr Turner at a nearby pub. The applicant became aggressive and threatened to 'shoot' Mr Dwyer. He removed the extendable baton from his front pocket, flicked it open and raised it above his head towards Mr Dwyer. The applicant ordered Mr Dwyer to 'sit the fuck down and shut the fuck up', pointing his baton towards a nearby chair in the hallway. The applicant occasionally pretended to swing the baton at Mr Dwyer in order to intimidate him.

93 The applicant then told Mr Dwyer to go to his own bedroom and sit on the bed. The applicant followed him into the bedroom, demanded that he hand over his mobile phone while brandishing the baton, then went through Mr Dwyer's bedroom and stole a laptop computer and the contents of his wallet (charge 1 — armed robbery).

94 The applicant took one of Mr Dwyer's credit cards from his wallet and said 'I know your name, I know where you live. If you call the police I'll fucking kill you' (charge 3 — make threat to kill).

95 The applicant also stole $250 in cash, a laptop computer, a camera, a musical flute and other items from Ms Rombauts's room. The applicant returned to Mr Turner's room and took more items. The items stolen from Mr Turner's room included two Apple iPhones and two Samsung mobile phones. These items, and the items stolen from Ms Rombauts's room, are the subject of charge 2 — theft.

96 An acquaintance of the applicant, Mr Neal, then knocked on the door of the flat and the applicant let him in. The applicant again warned Mr Dwyer not to call the police or he would kill him. He and Mr Neal then left with the stolen items.

97 The applicant and Mr Neal caught a taxi to a service station where the applicant bought a soft drink with Mr Dwyer's stolen credit card and then proceeded in the taxi to the applicant's girlfriend's home in Carnegie, paying for the taxi fare with the stolen credit card. The taxi fare and soft drink cost $26.38 (charge 4 — obtaining financial advantage by deception).

98 The applicant was arrested and interviewed by police on 10 July 2015. He provided a false alibi to the police as to his whereabouts on 10 June 2015 but otherwise gave a largely 'no comment' interview. The applicant was charged in respect of the first indictment charges and released on bail. The police obtained a warrant to search his girlfriend's house, where a number of the items stolen from the St Kilda flat were located.

Offending the subject of the second indictment

99 On 15 December 2015, while the applicant was on bail in respect of the first indictment charges and was serving the CCOs referred to at [119] below, he and two unidentified accomplices attended at a terrace house in Princes Hill at around midnight. Three of the four residents, who were not known to the applicant or his accomplices, were home at the time. The applicant was armed with a hammer and disguised with a hooded jumper covering his head and a bandana covering the lower part of his face. One of the accomplices carried a knife. The applicant and his accomplices walked into the house through the unlocked back door shortly after midnight. Once inside, the applicant and the accomplice with the knife pushed open one of the bedroom doors. The occupant of the room, Mr Irvine, was lying on his bed. The applicant and his accomplice brandished their weapons at Mr Irvine and demanded drugs and money (charge 2 — aggravated burglary).

100 The applicant and his accomplice repeatedly threatened Mr Irvine. They said: 'Don't fuck with us. Show us where it is. We will slit your throat, stab you or bust your knee caps with the hammer' (charge 3 — threat to inflict serious injury).

101 The applicant and his accomplices stole from Mr Irvine's room a laptop computer, passport, driver's licence and a bankcard (charge 4 — theft). They threatened the other two occupants of the house before departing.

102 On 27 December 2015, the applicant used a stolen credit card and Mr Irvine's passport to book a hotel room in St Kilda valued at $237.85 (charge 5 — obtaining financial

advantage by deception).

103 On 7 January 2016, the applicant attended the Caulfield police station to report on bail in relation to the first indictment charges. He was arrested for the aggravated burglary the subject of the second indictment and the car he had driven to the police station was searched. In the vehicle were a number of stolen items from other offences not the subject of this proceeding. The items included a credit card, a hair straightener, hair brushes and hairdryers, a GPS device and car ownership documentation in the name of someone else (charge 6 — handling stolen goods).

104 Also in the vehicle were several bags of methylamphetamine weighing a total of 14 grams. The applicant's mobile phone was seized and analysed and found to contain numerous messages on it relating to his purchase and sale of methylamphetamine between 1 August 2015 and 7 January 2016. The messages were indicative of trafficking on a daily basis during that period, in various sized transactions up to several grams at a time (charge 1 — trafficking in a drug of dependence).

105 Following his arrest on 7 January 2016, the applicant was remanded in custody. On 8 January 2016, he was interviewed at Caulfield police station and provided a record of interview in which he predominantly responded that he had 'no comment', but also made a series of denials and gave false explanations for the allegations put to him by the police. The applicant was granted bail on 11 February 2016. The special conditions of his bail included the following:

> That the accused
> Reside at ODYSSEY HOUSE 28 BONDS ROAD LOWER PLENTY
>
> …
>
> Not leave place of residence between the hours of 9.00pm and 7.00am except in the company of AN EMPLOYEE OF ODYSSEY HOUSE
> To present at the front door of residence during curfew hours upon request of any member of Victoria Police
>
> …
>
> COMPLY WITH ALL RULES AND LAWFUL DIRECTIONS OF ODYSSEY HOUSE

106 Odyssey House is a residential rehabilitation facility. Further details about the restrictions on residents' liberty at Odyssey House are set out at [126]–[Error: Reference source not found] below.

Applicant's personal circumstances

107 The applicant was born in Sydney on 1 September 1993. He was 21 years old at the time of the offending the subject of the first indictment ('first indictment offences'), and 22 years old at the time of the offending the subject of the second indictment ('second indictment offences'). He was 23 years old at the time of sentencing.

108 The applicant has no siblings. His family moved to the Gold Coast when he was two years old. He was loved and supported by both of his parents until they separated when he was 12 years old. He remained with his mother when his father moved to Israel. The applicant saw his father a few times after that, but has had no contact with him since 2014.

109 The applicant continued to have the support of his mother although they clashed at times over the years. He relocated with his mother to Melbourne where he was educated first at Yeshivah College and then at Mount Scopus Memorial College. He completed Year 12 and commenced a degree in civil engineering at Victoria University but left due to drug issues. In 2013, he recommenced a civil engineering degree at Deakin University in Geelong but ceased that course after being involved in a car accident.

110 At the time of the offending, the applicant was unemployed and lived in between his mother's house in Caulfield North and his girlfriend's house in Carnegie. He found it difficult to sustain paid employment due to his drug use.

111 The applicant started using drugs as a teenager. He used cannabis and alcohol heavily in his later school years. At the age of 18, he commenced using methylamphetamine. He was using between 1 and 2 grams of methylamphetamine per day at the time of his offending. He trafficked drugs regularly at that time.

112 In accordance with the conditions of bail referred to at [105] above, the applicant resided at Odyssey House between 15 February 2016 and the time of sentencing on 10 February 2017. He complied with all the requirements of his treatment and became drug free. He also recommenced a Bachelor of Arts degree at Deakin University.

113 The applicant's criminal history began in 2011. On 29 September 2011, he was dealt with by the Children's Court for charges of attempted robbery, theft, threat to inflict serious injury, unlawful assault, resisting police, graffiti offences, possessing cannabis and trespassing. He was released without conviction on a youth supervision order of six months.

114 On 29 March 2012, the applicant was dealt with again by the Children's Court for charges of affray, assault by kicking, handling stolen goods, possessing cannabis and dealing with property suspected of being proceeds of crime. The applicant was placed on probation for eight months without conviction.

115 On 25 January 2013, the applicant appeared at the Moorabbin Magistrates' Court on charges of possessing cannabis, using cannabis, possessing amphetamine, criminal damage and theft. He was convicted and released on a CCO of 12 months.[3] He successfully appealed that decision to the County Court on 12 August 2013 and a new CCO of 12 months, without conviction, was made by that Court.[4]

116 On 2 September 2014, the applicant appeared at the Melbourne Magistrates' Court on a variety of charges including theft, committing an indictable offence while on bail, using an unregistered vehicle, possessing a dangerous article in a public place, possessing a controlled weapon, trafficking ecstasy and trafficking methylamphetamine. He was released on a further CCO of 12 months with a number of conditions involving treatment and rehabilitation, mental health

[3] It is unclear from the Victoria Police Criminal History Report ('VPCHR') whether the applicant was sentenced to five concurrent CCOs or a single CCO. We have assumed, in his favour, that a single CCO was made.

[4] It is unclear from the VPCHR whether the applicant was sentenced to two concurrent CCOs or a single CCO. We have assumed, in his favour, that a single CCO was made.

assessment, 200 hours of unpaid community work and judicial monitoring.[5]

117 On 17 November 2015, the applicant came back before the Melbourne Magistrates' Court on charges of possessing a prohibited weapon and was fined $200 with conviction.

118 On 10 December 2015, the applicant was fined $100 in respect of some traffic offences.

119 On 11 December 2015, the applicant appeared at the Melbourne Magistrates' Court on charges which included obtaining property by deception, knowingly uttering counterfeit money, obtaining property by deception, using methylamphetamine, burglary, theft and attempted burglary. He was convicted and released on four concurrent CCOs, one of which was for a term of six months and three of which were for terms of 12 months.[6] Two of the CCOs included conditions involving treatment and rehabilitation and mental health assessment. All the CCOs required performance of unpaid community work.

Plea hearing

120 On 26 May 2016, the applicant pleaded guilty to the first indictment charges and a plea hearing was listed for 24 August 2016. The plea was adjourned by the judge on that day pending the determination of the second indictment charges, which were then listed for trial in 2017. The judge expedited the trial and heard pre-trial argument on 5 September 2016. After the judge ruled in favour of the prosecution in relation to the admissibility of certain identification evidence, on 6 September 2016, the applicant pleaded guilty to the second indictment charges.

121 At the plea hearing on 7 February 2017, the applicant tendered two reports of a forensic psychologist, Patrick Newton, dated 16 August 2016 and 2 February 2017,

[5] It is unclear from the VPCHR whether the applicant was sentenced to three concurrent CCOs or a single CCO. We have assumed, in his favour, that a single CCO was made.

[6] On our calculations, between 25 January 2013 and 11 December 2015, the applicant was sentenced to six CCOs. On the plea, the prosecutor submitted that the applicant had been the subject of seven CCOs. See Transcript of Proceedings, *DPP v Akoka* (County Court of Victoria, CR 16–00186, Judge Chettle, 7 February 2017) 68, 96.

respectively. Mr Newton outlined the benefit the applicant had received as a result of his successful involvement with Odyssey House, and the significant progress he had made in his rehabilitation.

122 In his report dated 16 August 2016, Mr Newton gave the following opinion:

> The chronic nature of [the applicant's] problems and their intensity both militate against a flippant optimism in his case. Even in optimal circumstances his problems will only be resolved with dedication and perseverance on his part. This, together with his past failures to benefit from treatment, underscores the importance of ongoing supervision to ensure his compliance with the treatment he requires. From the perspective of his recovery, the provision of an integrated treatment program which addresses his mental-health and substance-related problems would provide the best chance for [the applicant] to be rehabilitated to productive life in the community. Accordingly, speaking from a clinical perspective, the more actively his problems can be addressed in a context of oversight and support the better his prognosis is likely to be.

123 In his second report dated 2 February 2017, Mr Newton stated as follows:

> [The applicant's] drug addiction is now in a state of sustained remission. I understand that if he were to continue in the Odyssey House program he would gradually articulate into less restrictive conditions of residence with maintenance of support throughout any period of transition into the medium term. In my view (and speaking purely in terms of [the applicant's] rehabilitation) such an approach to his continued management would have much to recommend it. Certainly, [the applicant] has approached his rehabilitation to date with a degree of application which is unusual in the clients I assess and treat, and which bodes well for his recovery. Provided he can complete this program with the same degree of diligence that he has shown to date, the progress he has made suggests that his prognosis for recovery would be considered to be very good.
>
> Were [the applicant] to be returned to a custodial environment, his prognosis would be significantly less positive. In particular it is highly unlikely that he would be able to access the structured rehabilitation that he currently enjoys. Moreover, immersion in a sub-culture where drug use is commonplace and where the dominant attitude towards recovery is considerably more sceptical would pose obvious challenges for [the applicant]. These challenges would be particularly intense given the role which immersion in the drug-using subculture played in his previous descent into addiction. While his relapse-prevention skills and commitment to change seem robust, it is fair to say [that the applicant] is highly influenced by the people around him and tends readily to conform to the norms of any group with which he affiliates. In his current therapeutic community this tendency has been an asset. In his previous lifestyle it was severely detrimental. In a custodial environment, it would pose challenges which are self-evident.
>
> In short, [the applicant] has made excellent progress towards his treatment goals. His mental state is stable and his addiction is in sustained remission. If

> built upon, the progress he has made has the potential to provide a foundation for a sustained change in lifestyle. From the perspective of his rehabilitation to productive life in the community (which is acknowledged to be only one of several factors before the Court) there would be considerable benefit in supporting him to continue the treatment he has commenced since his arrest.

124 The applicant tendered a letter from Brendan Smithers, a therapist at Odyssey House. He described Odyssey House's 'cardinal rules' of 'No drugs or alcohol, no violence or threats of violence, no stealing, no sex'. He also stated that the applicant was required to submit to urinalysis three times per week.

125 Mr Smithers also gave evidence on the plea. He said that the rules of Odyssey House required the applicant not to leave its premises at any time without permission, and that, where permission was granted, it was usually conditional on the applicant being accompanied by someone else from Odyssey House. He also said that a significant proportion of residents' Centrelink payments is applied towards the costs of the Odyssey House treatment program.

126 Mr Smithers gave the following further evidence about the applicant: He had made progress since being at Odyssey House. He had not only been drug free, but was more receptive to feedback and looked after himself physically which included attending gym at 5.30 am numerous mornings per week and attending Narcotics Anonymous. He had expressed remorse for his past behaviour and claimed to be committed to not repeating it. He had empathy for his victims and had embraced a new set of beliefs and values. He had acted as a mentor to junior residents and had contributed significantly to other residents and to the Odyssey House community generally. At the time of sentencing, he was a senior resident on level three of the treatment program and had approximately eight months remaining on the program, after which it was envisaged that he would live for some time in a sharehouse with some of his Odyssey House peers. It would be beneficial for him to remain at Odyssey House to continue his treatment.

127 The applicant relied heavily on his demonstrated rehabilitation. He submitted that his young age, his progress in rehabilitation, the support of his mother and his pleas of

guilty warranted the imposition of a lengthy CCO with various conditions, including that he reside at Odyssey House. The applicant relied on the following passage from *Boulton v The Queen*:[7]

> It follows from what we have said that a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and some categories of homicide). The sentencing judge may find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation.
>
> …
>
> As discussed earlier, the CCO can be used to rehabilitate and punish simultaneously. This significantly diminishes the conflict between sentencing purposes, particularly acute in relation to young offenders. No longer will the court be placed in the position of having to give less weight to denunciation, or specific or general deterrence, in order to promote the young offender's rehabilitation. Rather, the court will be able to fashion a CCO which adequately achieves all of those purposes.[8]

128 The applicant submitted that it was in the community's interest to rehabilitate offenders like him and that his 'spectacular' rehabilitation called for the exercise of mercy. In support of that submission, the applicant relied on several authorities, including *Director of Public Prosecutions v Apostolopoulos*[9] and *El Achkar v The Queen*.[10] These cases are discussed under Ground 1 below.

129 The judge said the following about the applicant's submission that a merciful sentence should be imposed:

> I'm not unsympathetic. I just — the law is the law. It's not a question of what I think. It's a question of … what the law says I have to do and take into account, and his rehabilitation, and his interests are only a fraction of what I have to take — a part of what I have to take into account.
>
> There are significant factors which — you know, general deterrence — he needs to be specifically deterred himself, but general deterrence and denunciation. People are heartily sick of agg burgs. Terrified of them. They

7 (2014) 46 VR 308 ('*Boulton*').

8 Ibid 338 [131], 349 [186].

9 [2016] VSCA 201 ('*Apostolopoulos*').

10 [2016] VSCA 209 ('*El Achkar*').

> change lives and I know your victim, at least one of your victims, is supportive.[11]

130 The applicant also submitted that the practical effects of confinement to a residential drug treatment facility are not dissimilar to some of the punitive aspects of imprisonment and his time at Odyssey House should accordingly be treated as a form of pre-sentence detention.

131 The judge said the following about the time the applicant had spent at Odyssey House:

> If you've been on bail conditions that have been strict and had you reporting that's a relevant factor to sentence, and obviously if you've been in effectively custodial residential — that's what you have been — it matters.[12]

132 The prosecution tendered victim impact statements from Mr Irvine and Ms Rombauts. Ms Rombauts listed the value of the items stolen from her room, described the disruption the theft of those items had caused her and stated that she continued to 'have trouble feeling safe when [she was] alone in a flat'. She said that every time she leaves her flat she is afraid that she will not find her belongings there upon her return. Mr Irvine stated: that he suffered trauma as a result of the offending; that he had lost his job due to his inability to cope with stress; and that he still gets anxious when he is home alone. Notwithstanding these adverse effects, Mr Irvine stated that '[t]he humanist in [him] hopes for a positive and constructive outcome as [he is] a big believer in second chances'.

133 During the course of the plea hearing on 7 February 2017, the judge informed the parties that he would arrange for the applicant to be assessed for suitability for a CCO. The plea hearing was adjourned until 10 February 2017. On 8 February 2017, the applicant was assessed as being 'medium risk of re-offending' and as suitable for a CCO.

134 On 10 February 2017, the applicant filed further written submissions which discussed in detail the approach of the New South Wales Court of Criminal Appeal in

[11] Transcript of Proceedings, *DPP v Akoka* (County Court of Victoria, CR 16–00186, Judge Chettle, 7 February 2017) 97.

[12] Ibid 80.

characterising residence at a rehabilitation facility as 'quasi-custody' and in giving discrete credit for such residence in sentencing.[13] The further submissions also relied on Mr Irvine's victim impact statement. Just prior to sentencing the applicant, the judge said the following about the applicant's further submissions:

> I have read [the further written submissions] and I can assure you that I deal with both the matters — effectively you raise the issue of, and you did the other day, about the confinement that he placed himself in for 12 months at Odyssey [House], it's been like detention custody or pre-sentence detention. And the attitude expressed by [Mr Irvine], they're the two main points you cover. I [have addressed] both those in the sentencing remarks I'm about to deliver.[14]

Sentencing remarks

135 In sentencing the applicant, the judge took into account a number of factors in mitigation and reduced the individual sentences he imposed to reflect them.[15] Those factors included the following:

> I have taken into account your age. You are now only 23 and were only 21 and 22 at the time you offended. I do give you the appropriate reduction in sentence to reflect your pleas of guilty which have considerable utilitarian value, even though not made at the earliest opportunity. I have significantly reduced the sentences I am about to impose to recognise the rehabilitation you have achieved over the past 12 months.[16]

136 In relation to the applicant's steps towards rehabilitation, the judge said that he was required to give as much effect to that rehabilitation as he could by the *Sentencing Act 1991*.[17] The judge said the following:

> After your most recent arrest and being bailed, you appeared to have finally come to understand the serious nature of your offending and the need to rid yourself of your drug addiction.
>
> …

13 The applicant relied on *R v Campbell* [1999] NSWCCA 76 [24] ('*Campbell*'); *R v Delaney* (2003) 59 NSWLR 1, 6 [22]–[23] ('*Delaney'*). The applicant also relied on *Robinson v The Queen* (2015) 47 VR 226, 240 [50] ('*Robinson*'); *R v Eyles (No 3)* [2017] ACTSC 1 [103]–[105] ('*Eyles*'); *Okwechime v Sindel* (2009) 171 ACTR 1, 15–16 [65]. See [182], [186]–[187], [190] below.

14 Transcript of Proceedings, *DPP v Akoka* (County Court of Victoria, CR 16–00186, Judge Chettle, 10 February 2017) 105.

15 Sentencing remarks [45].

16 Ibid [38].

17 Ibid.

> I accept without reservation that you have demonstrated substantial and significant rehabilitation over the past 12 months. The report of Mr Newton and the letters from Odyssey [House] tendered … all paint a positive picture of the steps you have achieved at Odyssey [House]. You have taken appropriate action to address the factors that underpinned your criminal behaviour.
>
> …
>
> Your future prospects undoubtedly depend upon you maintaining your drug-free status. Ultimately that is up to you. The concerns expressed by Mr Newton and Mr Smithers as to the dangers of the effect of a term of imprisonment upon you are valid. However, if you do now hold the new set of values and beliefs that you say you do, you will understand and appreciate the need for you to maintain a drug-free lifestyle and that unless you do, you will find yourself back in prison in the future for increasing lengths of time. Clearly the future rests squarely in your hands.[18]

137 The judge said that the applicant's criminal history — which he described as extensive and concerning for someone so young[19] — was 'typical of the offending associated with drug abuse'.[20] He also said that the applicant was '[c]learly … ice-fuelled and out of control' when he committed the offences.[21]

138 In relation to the seriousness of the offending, the judge said that the Court of Appeal had made it 'crystal clear' that 'offences such as armed robbery, aggravated burglary and drug trafficking are extremely serious and substantial terms of imprisonment should be expected to be imposed on those who commit such offences'.[22]

139 The judge also said the following about the seriousness of the crimes and the applicant's criminal history:

> You have no respect for the law, failed to comply with court orders and bail conditions, you trafficked drugs regularly for over five months, being an active street-level dealer. Your criminal behaviour continued to escalate. Your armed robbery offending was a serious example of that offence. You threatened and stole from people in their own home at night. You carried a weapon and you threatened to use it.
>
> When bailed you continued to sell drugs and carried out a serious example of a confrontational aggravated burglary. You disguised yourself, threatened

18 Ibid [32], [36], [39].

19 Ibid [19].

20 Ibid [28].

21 Ibid [30].

22 Ibid [40].

> serious injury to innocent victims, stealing items from them in their own homes late at night.
>
> …
>
> You were a young man with a relevant prior criminal history. You had been given several opportunities by the courts to deal with your underlying drug issues. You were on bail and on court orders at the time you offended. Your offending … involved three distinct sets of offending. Each of your armed robbery, aggravated burglary and drug traffick offences were serious examples of those offences. You offended repeatedly and seriously over a period of seven months.[23]

140 The judge also took into account the two victim impact statements.[24]

141 The judge did not accept the applicant's submission on the plea that his youth, his progress towards rehabilitation, the support of his mother and his pleas of guilty, warranted the imposition of a CCO. The judge considered that the offending was 'simply too serious and too repetitive and too protracted'.[25] The judge reached that conclusion having acknowledged that the cases of *El Achkar* and *Apostolopoulos* were 'helpful' to the applicant's submission.[26]

142 In relation to the applicant's reliance on aspects of *Boulton*,[27] the judge said that this Court has 'made it clear that there are some cases where the options of sentencing explained in *Boulton* are simply not open'.[28] The judge said the following:

> Although imprisonment must always be the last option for a sentencing judge, principles of general deterrence, just punishment and expression of community denunciation of serious criminal conduct such as yours leave me with no other option but to impose terms of imprisonment for your offending.
>
> The maximum penalties set by Parliament for each of your offences demonstrate how seriously your offending is to be regarded. The objective gravity of your offending and your high moral culpability leave this court with no other sentencing option. Cases such as *Hogarth*, *Meyers* and *Bowden* referred to by your counsel give this court clear guidance, in my view, in this case.[29]

23 Ibid [30]–[31], [41].

24 Ibid [18]. See [132] above.

25 Sentencing remarks [42].

26 Ibid.

27 (2014) 46 VR 308.

28 Sentencing remarks [42].

143 The judge also considered the imposition of a combined sentence involving a term of imprisonment and a CCO, and said the following:

> [A]lthough you were found suitable for a community corrections order when assessed, I am of the view this court is unable to impose such a combination sentence because a term of imprisonment well in excess of two years must be imposed in your case.
>
> The purposes of sentencing as set out in the *Sentencing Act* cannot be achieved by the imposition of a community corrections order in your case.[30]

144 In relation to the non-parole period and the restrictive nature of the applicant's residence at Odyssey House, the judge said the following:

> I propose to impose a longer than [usual] parole period to properly reflect your prospects for rehabilitation and the efforts you have made over the past 12 months. You have been an inpatient at Odyssey [House] over that time and subject to significant restrictions of movement and I take that fact into account in sentencing you.[31]

Grounds of appeal

145 The applicant's proposed grounds of appeal are as follows:

> **Ground 1**:
>
> The learned sentencing judge erred in fettering his discretion to extend mercy to the applicant, in that his Honour:
>
> (i) misapprehended that the seriousness of the offending precluded a consideration of the exercise of mercy; and/or
>
> (ii) conflated the discretion to exercise mercy with the principles set out in [*Boulton*].
>
> **Ground 2**:
>
> The learned [sentencing] judge erred in failing to take into account, as a form of presentence detention or additional punishment, the 12 months the applicant had spent engaging in a residential drug rehabilitation program at Odyssey House up until the date of sentence.
>
> **Ground 3**:
>
> The individual sentences, orders for cumulation and non-parole period are manifestly excessive in light of the applicant's youth, guilty pleas, and

29 Ibid [43]–[44].

30 Ibid [46]–[47].

31 Ibid [48].

substantial rehabilitation achieved.

Ground 1: Discretion to exercise mercy

Parties' submissions on Ground 1

146 The applicant submitted that the judge erred in conflating the principles set out in *Boulton*, and the cases which have applied those principles, with a consideration of whether to exercise mercy. According to the applicant, the judge misapprehended that the seriousness of the offending precluded a consideration of the exercise of mercy, as mercy may be extended even in cases involving serious offending by an offender with a bad record.[32]

147 In relation to the concept of mercy, the applicant relied on the following statement of King CJ in *R v Osenkowski*:[33]

> There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.[34]

148 The applicant submitted that the availability of a CCO even in cases of relatively serious offences such as aggravated burglary and armed robbery is not dependent on an exercise of mercy, and noted that in *Boulton*, this Court did not refer to the principle of mercy at all. Rather, so it was said, the fact that a CCO may be imposed in respect of serious offences even absent an exercise of mercy is reflective of the fact that the CCO is 'intrinsically punitive and is capable — depending on the length of the order and the nature and extent of the conditions imposed — of being highly punitive'.[35]

149 The applicant accepted that subsequent decisions of this Court make clear that a CCO will not be appropriate in every case of a relatively serious offence, that the

[32] The applicant referred to *El Achkar* [2016] VSCA 209 [19]–[20].

[33] (1982) 30 SASR 212 ('*Osenkowski*').

[34] Ibid 212–13. The applicant also relied on *R v Miceli* [1998] 4 VR 588, 592–4.

[35] The applicant cited *Boulton* (2014) 46 VR 308, 337 [124].

principles in *Boulton* do not constitute a 'Get Out of Jail Free' card,[36] and that in some cases the particular offending in question is too serious to justify the imposition of a CCO having regard to the circumstances of the offender. However, he submitted that none of those cases have involved a claim for clemency.

150 According to the applicant, the discretion to exercise mercy depends by its very definition on what the judge thinks. Specifically, so it was said, it depends on whether the judge considers that leniency at that particular stage of the offender's life might lead to reform. The applicant submitted that the judge's statement that he was 'not unsympathetic' but that it was 'not a question of what [he thinks]'[37] indicates that he erred. He did so, according to the applicant, because he considered that the seriousness of the offending precluded a consideration of the principles of mercy notwithstanding that his sympathies were 'excited by the circumstances of the case' as described in *Osenkowski*.[38]

151 In support of his submission that the judge considered himself precluded from exercising mercy in his favour and did not take this sentencing principle into account, the applicant relied on the fact that the judge made no reference to the principle of mercy in his sentencing remarks.

152 The Crown submitted that the exercise of mercy had to be considered in the context of other relevant sentencing considerations, including the gravity of the offending, and could not overwhelm the sentencing process.[39] The Crown referred to the statement in *R v Kane*[40] that '[i]f a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.'[41]

36 *Hutchinson v The Queen* (2015) 71 MVR 8, 13 [17].

37 See [129] above.

38 See [146] above.

39 The Crown referred to *DPP v Moore* [2009] VSCA 264 [9], [14], [19]–[20].

40 [1974] VR 759.

41 Ibid 766.

153 The Crown submitted that it is significant that the extent of the mercy sought was in the form of an entirely non-custodial sentence, and that it was plain that the judge considered, for a number of reasons, that a non-custodial disposition was inappropriate.

154 The Crown contended that when considering whether to exercise mercy, the judge did not conflate it with the principles in *Boulton* or misapprehend that the seriousness of the offending precluded it. According to the Crown, the judge's sentencing remarks, particularly at paras 42 and 43,[42] demonstrate a conclusion that imprisonment was the only option, despite the plea for mercy and the options for sentencing set down in *Boulton*. This did not mean, so it was said, that the judge misapprehended that the seriousness of the offending precluded a consideration of the exercise of mercy.

155 In relation to the judge's statement during the plea that he was 'not unsympathetic' but that it is 'not a question of what [he thinks]',[43] the Crown submitted that that passage demonstrates that the judge's sympathies were not excited by the applicant's circumstances and that he was concerned about also achieving other sentencing purposes.

Decision on Ground 1

156 In our opinion, Ground 1 is not made out.

157 It is clear from the discussion at the plea that the judge was well aware of the principle of mercy and that he had turned his mind to whether it was possible to moderate the sentence he would otherwise have imposed on the applicant by reference to that principle. The judge's observations on the plea indicate that, while he was sympathetic to the efforts that the applicant had made to rehabilitate himself at Odyssey House, the other applicable sentencing considerations — including, in particular, the seriousness of the offences — did not warrant such moderation as

[42] See [141]–[142] above.

[43] See [129] above.

would enable him to make a CCO or impose a combination sentence.

158 The fact that the judge did not specifically refer to the principle of mercy does not mean that he failed to take it into account. As that principle loomed large in the applicant's written and oral submissions on the plea, it can be safely assumed that the judge gave it due consideration.

159 The judge's sentencing remarks do not support the applicant's contention that the judge fettered his discretion to extend mercy due to the seriousness of the offending. Rather, those remarks indicate that, having taken into account the principle of mercy and other sentencing considerations, the judge decided to impose a sentence which was different in form to, and more severe than, the sentence contended for by the applicant.

160 We turn to consider the place of mercy in the instinctive synthesis. That there must always be a place for the exercise of mercy where the circumstances warrant it is well recognised.[44] In *Cobiac v Liddy*,[45] Windeyer J, speaking of mercy, said that it may 'in special circumstances … avoid the rigidity of inexorable law' and that it 'is of the very essence of justice'.[46] In *R v Miceli*,[47] Tadgell JA said that 'it cannot be doubted that an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion'.[48] Charles JA referred to the task of the sentencing judge to consider 'whether, on the evidence before him, a reasonable basis existed in well-balanced judgment for adopting a course which might bear less heavily on the applicant than if he were to receive his just deserts.'[49] He referred to the joint reasons in *R v Kane*[50] in which the Full Court said:

> [J]ustice and humanity walk together. Cases frequently occur when a court is

44 *Webb v O'Sullivan* [1952] SASR 65, 66; *Yardley v Betts* (1979) 22 SASR 108, 112–13; *Osenkowski* (1982) 30 SASR 212, 212–13; *DPP (Cth) v Carter* [1998] 1 VR 601, 607.

45 (1969) 119 CLR 257.

46 Ibid 269.

47 [1998] 4 VR 588.

48 Ibid 592.

49 Ibid 594.

50 [1974] VR 759.

> justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.[51]

161 It is important to recognise, however, that 'just' punishment and proportionality do not permit the imposition of a merciful sentence that is plainly inadequate.[52] Considerations of mercy need to be weighed alongside all other sentencing factors in order to provoke the instinctive synthesis that discloses the relevant range.[53] In *Adams v The Queen*,[54] this Court said:

> The facts of a particular case may justify the sentencing judge adopting a merciful approach to the exercise of his or her sentencing discretion. However, while considerations of mercy may inform the appropriate range, they cannot justify a manifestly inadequate sentence. The sentences imposed on Soltan were well below the range that was appropriate for his offending.
>
> …
>
> In re-sentencing Soltan and Paranihi, it is appropriate for this Court to take into account Judge Smallwood's finding that merciful sentences were warranted. As we have said … however, while considerations of mercy may inform the appropriate sentencing range, they cannot justify a sentence that is manifestly inadequate. In all the circumstances, considerations of mercy did not warrant the weight that his Honour accorded to them in sentencing Soltan and Paranihi.[55]

162 The impugned passage of the sentencing judge's observations[56] was no more than a recognition that considerations of mercy could not warrant the disposition which the applicant was seeking.

163 We also reject the applicant's submission that the judge conflated the principle of mercy and the principles set out in *Boulton* for making a CCO. The applicant's primary submission on the plea, which he agreed was 'a big call', was that, having regard to

51 Ibid 766.

52 *DPP v Cook* (2004) 141 A Crim R 579, 586 [16].

53 *DPP v Moore* [2009] VSCA 264 [19].

54 *Adams v The Queen; DPP v Paranihi; DPP v Soltan* [2011] VSCA 77.

55 Ibid [70], [89] (citations omitted).

56 See [129] above.

the significant progress with his rehabilitation and the other mitigating circumstances in his favour, the principle of mercy warranted a non-custodial sentence, namely, a CCO. As a fall back, the applicant submitted that a combination sentence of up to two years' imprisonment and a CCO would be appropriate. In these circumstances, it is not surprising that the judge focused on whether a CCO, or a combination sentence, was open to him. By determining that such sentencing dispositions were not open to him, the judge necessarily concluded that the principle of mercy could not assist the applicant in the manner he had contended.

164 The judge did not err in the application of the principles relating to the making of a CCO or a combination sentence that are discussed in *Boulton*.

165 In our opinion, the judge was correct to conclude that the circumstances of the offenders in *Apostolopoulos* and *El Achkar* were very different from the circumstances of the applicant and therefore those cases provided little guidance on the appropriate sentencing disposition in the present case.

166 In *Apostolopoulos*, the offender — who had been involved in trafficking in cocaine over a six month period — was placed on a three year CCO. The Director of Public Prosecutions appealed on the ground that the sentence was manifestly inadequate. This Court dismissed the appeal. After noting that the offender had no relevant criminal history and that he had 'exhibited rehabilitation of a very impressive kind',[57] the Court said:

> In our view, while the sentence could be described as lenient or merciful, this was the very sort of case to which the Court's observations in *Boulton* apply …[58]

167 In *El Achkar*, the offending involved two occasions of single transaction trafficking of methylamphetamine in small amounts. The offender, who had a relevant criminal history, was sentenced to a total effective sentence of two years and eight months' imprisonment, eight months of which had been served by the time his appeal against

[57] *Apostolopoulos* [2016] VSCA 201 [41].

[58] Ibid [42].

sentence was heard. The Crown conceded that the sentence was manifestly excessive. This Court allowed the appeal and imposed a combination sentence comprising the eight months he had already served and a two year CCO. The Court noted that the offender had successfully undertaken a residential drug treatment program for five months[59] and agreed with the Crown's submission that the evidence of the offender's rehabilitation was 'strong'.[60] The Court quoted with approval the Crown's submission that the principle in *Osenkowski* which is set out at [146] above should have been invoked in that case because the offender was at the 'crossroads' in terms of reform, and leniency was warranted in the light of the efforts he had made to date.[61]

168 By way of contrast, the present case involved not only trafficking in methylamphetamine over a six month period but also a serious armed robbery, an aggravated burglary and other offences. Furthermore, the applicant had an extensive prior criminal history and there were many aggravating circumstances to his offending. These included the fact that he breached his bail and a CCO when he committed both sets of offending. Indeed, he committed three of the second indictment offences four days after he was placed on four concurrent CCOs.[62] The serious nature of the applicant's offending[63] and his inability to benefit from the six CCOs to which he was subject provided ample justification for the judge to refuse to make yet another CCO.

Ground 2: Odyssey House residency as a form of pre-sentence detention

Parties' submissions on Ground 2

59 *El Achker* [2016] VSCA 209 [18].

60 Ibid [6].

61 Ibid [19]–[20].

62 Furthermore, the applicant was dealt with by the courts on three separate occasions during the period from 1 August 2015 until 7 January 2016 within which he committed the trafficking offence.

63 This Court has repeatedly emphasised that, ordinarily, a lengthy period of imprisonment should be imposed for the offence of aggravated burglary. See *Hogarth v The Queen* (2012) 37 VR 658; *DPP v Meyers* (2014) 44 VR 486; *DPP v Bowden* [2016] VSCA 283.

169 The applicant submitted that the period of nearly 12 months that he spent as a resident at Odyssey House gave rise to two separate sentencing considerations. The first consideration was the progress that he had made towards his rehabilitation during the residency. The second consideration was the 'credit' that should be given for the 'quasi-custody' nature of the residency by analogy to pre-sentence detention or *Renzella* time.

170 In *R v Renzella*,[64] this Court held that s 18 of the *Sentencing Act 1991* is not an exhaustive statement of the extent to which pre-sentence detention may be taken into account, and that '[p]resentence detention to which s 18 does not apply is to be taken into account in the exercise of the court's discretion'[65] as a 'matter of justice'.[66] According to the applicant, *Renzella* and subsequent cases established that there are two ways in which a sentencing court may take pre-sentence detention into account in the exercise of its discretion. The first way is by making a declaration (independently of s 18) that a period of imprisonment be reckoned as time served under the sentence. The second way is by reducing the sentence passed to allow for the time spent in custody, as part of the inherent jurisdiction of the court to do justice in the sentencing process.[67]

171 The applicant contended that, notwithstanding that he had relied on both the rehabilitative and punitive aspects of his residency at Odyssey House, the judge had taken into account only the former. The applicant argued that, in accordance with authorities from interstate courts, the judge should have treated the two aspects as distinct and given them separate consideration as mitigating factors.[68]

172 According to the applicant, the magnitude of the sentence imposed — a total effective sentence of six years' imprisonment following pleas of guilty by a young man who

64 [1997] 2 VR 88 ('*Renzella*').

65 Ibid 98.

66 Ibid 97.

67 The applicant relied on *R v Arts* [1998] 2 VR 261, 264–5, 272.

68 The applicant relied on *R v Eastway* (Unreported, New South Wales Court of Criminal Appeal, 19 May 1992) ('*Eastway*'); *Campbell* [1999] NSWCCA 76, [24]; *Eyles* [2017] ACTSC 1 [103]. These cases are discussed at [184], [186], [190] below.

had committed the offences when he was 21 and 22 years old — supports the submission that the judge did not take into account his 12 months in residence at Odyssey House as a form of pre-sentence detention or additional punishment. That was said to be evident in circumstances where the disposition urged by the applicant — a CCO as a stand-alone sentence or in combination with a term of imprisonment — would have constituted a significant further punishment.[69]

173 The applicant referred to the restrictions and requirements of the Odyssey House residential rehabilitation program which were described by Mr Smithers[70] and submitted that they were significant. The applicant relied on *Robinson v The Queen*[71] in which this Court recognised the severe restrictions imposed on residents in supervised treatment facilities.

174 The applicant accepted that the application of the instinctive synthesis to sentencing did not require sentencing judges to quantify the extent of any discount they apply on account of the punitive nature of residency at a rehabilitation facility. However, given the significance of this sentencing consideration, it was said to be incumbent on sentencing judges to make clear in their sentencing remarks that they had taken it into account and to explain how it had informed the instinctive synthesis.

175 As an alternative to his submission that the judge had erred by failing to take into account the punitive nature of his residency at Odyssey House, the applicant submitted that the judge erred by taking into account the residency only in fixing the non-parole period. The applicant relied on the judge's statement set out at [143] above in which the reference to the punitive nature of the residency was included in a paragraph which explained why the judge fixed a shorter than usual non-parole period.

176 As a further alternative, the applicant submitted that, if the judge took into account the punitive nature of his residency at Odyssey House in relation to both the head

[69] The applicant referred to *Boulton* (2014) 46 VR 308, 326 [68], 331 [90], 331–2 [95]–[97].

[70] See [124]–[Error: Reference source not found] above.

[71] (2015) 47 VR 226, 240 [50]–[51], 241 [55].

sentence and the non-parole period, he did not give it sufficient weight.

177 The Crown submitted that, unlike some other Australian jurisdictions, the practice in Victoria is for sentencing judges to take into account the punitive nature of residency at a rehabilitation facility in a general way as part of the application of the instinctive synthesis. According to the Crown, sentencing judges in Victoria are not required to recognise residency in specialist rehabilitation drug facilities in the same way as in other States. In particular, so it was said, there is no practice in Victoria of nominating percentages for the reduction of sentences due to such residency.

178 The Crown contended that the judge's sentencing remarks indicate that he acted in accordance with the prevailing practice in Victoria in that he specifically took into account the efforts the applicant had made over the past 12 months at Odyssey House and the restrictions it placed on his freedom of movement.[72]

179 The Crown accepted that the punitive nature of residency at a rehabilitation facility is relevant — in the general manner in which it had articulated — to both the head sentence and the non-parole period. The Crown conceded that, if when properly construed, the judge's statement set out at [143] above meant that he took into account the punitive nature of the applicant's residency at Odyssey House only in fixing the non-parole period, then he fell into error.

180 The Crown did not accept that *Renzella* had any application to a case involving time spent in a rehabilitation facility, because that case concerned recognition of time spent in custody, which is starkly different.

Decision on Ground 2

181 To date, this Court has not been required to directly consider how the punitive nature of residency at a rehabilitation facility is to be taken into account in the exercise of the sentencing discretion and, in particular, whether the approach adopted by the New

[72] The Crown referred to the judge's sentencing remarks set out at [143] above. The Crown also referred to the comments the judge made during the plea hearing which are set out at [131], [134] above.

South Wales Court of Criminal Appeal and the Supreme Court of the Australian Capital Territory should be followed in Victoria.

182 The punitive nature of time spent as a resident at a rehabilitation facility has been considered in Victoria in the context of bail conditions. In *Robinson*, Maxwell P and Redlich JA described a set of bail conditions — which included requiring the offender to remain as a resident at a rehabilitation facility and participate in drug rehabilitation — as a severe restriction on his freedom of movement and association.[73] They also held that it should not matter greatly that the conditions of bail were put forward by the offender's lawyers for the purpose of avoiding his incarceration, because 'that may be exactly the incentive needed for [the offender] to confront the need to escape from addiction.'[74]

183 The approach of the New South Wales Court of Criminal Appeal involves taking into account time spent as a resident in a rehabilitation facility as time spent in 'quasi-custody'.

184 In *R v Eastway*,[75] the offender, who had pleaded guilty to a drug trafficking offence, was sentenced to two years and eight months' imprisonment. The sentencing judge gave him a credit of 14 months for the time he had resided at Odyssey House 'as if he had spent [that time] in custody'.[76] This represented an allowance of around 50 per cent of the period of two years and three months the offender had spent as a resident at Odyssey House. The New South Wales Court of Criminal Appeal dismissed the Crown's appeal against the sentence. Hunt CJ at CL (with whom Gleeson CJ and Mathews J agreed) said the following in relation to the credit given by the judge:

> The evidence before the judge shows that, although there are no locked doors, the programme does not permit a resident to leave the Odyssey House premises for some nine months except for court appearances and to satisfy bail reporting requirements. Family visits are then permitted at Odyssey House itself, and next home visits are permitted provided that the resident is accompanied by a minder. … [A representative of Odyssey House] told the

73 *Robinson* (2015) 47 VR 226, 240 [50].

74 Ibid 241 [55].

75 Unreported, New South Wales Court of Criminal Appeal, 19 May 1992.

76 Ibid 6.

> judge that, in his opinion, it is harder to be in Odyssey House than to be in gaol because of the discipline, the structure, the demands, the expectations and the hard work involved in the programme.
>
> With due respect, I think that is overstating the position to some extent. There is surveillance, and there is a system in place where defaulters who are on bail are immediately reported to the police. But the fact remains that any resident on bail is free to leave Odyssey House at any time, although the almost inevitable consequence of doing so is that he will then be returned to custody in gaol. There is nevertheless a real distinction.[77]

185 The New South Wales Court of Criminal Appeal subsequently endorsed an allowance of approximately 50 per cent of the credit that would be given in respect of pre-sentence detention. For example, in *R v Douglas*,[78] Gleeson CJ (with whom Hunt CJ at CL and Hidden J agreed) stated the following in relation to time spent by offenders at Odyssey House:

> [T]his Court has, on a number of occasions, recognised the regime at Odyssey House, which is ultimately directed at treatment and rehabilitation in the case of drug users, as being of a quasi custodial nature. Indeed, on a number of occasions when considering credit that an offender ought to be given for pre-sentence custody, or a regime in the nature of pre-sentence custody, the Court has treated time spent at Odyssey House as warranting credit, if I may use that expression, in the order of approximately 50 percent of the credit that would be given for pre-sentence custody.[79]

186 In *R v Campbell*,[80] Kirby J (with whom Grove J agreed) considered the failure of a sentencing judge to take into account time spent by an offender undergoing residential rehabilitation and held that '[i]t was appropriate that the [offender] should have received recognition, and credit for the time spent in rehabilitation'.[81] After referring to the credit of around 50 per cent given in *Eastway* and noting that in some other cases the proportion has been as high as 75 per cent,[82] Kirby J said the following:

> Here [the sentencing judge] did not advert to this aspect, although unquestionably his Honour was aware that the [offender] had undergone rehabilitation. It is not apparent from his remarks on sentence that credit was

77 Ibid.

78 Unreported, New South Wales Court of Criminal Appeal, 4 March 1997.

79 Ibid 4.

80 [1999] NSWCCA 76.

81 Ibid [24].

82 Ibid.

> given to the applicant for time spent in rehabilitation. This was an important matter which ought not to have been left to inference. Therefore, I am prepared to find there was error, justifying intervention by this Court, and the setting aside of the sentence.[83]

187 In *R v Delaney*,[84] James J (with whom Santow JA agreed)[85] held that the sentencing judge had erred in refusing to take into account the time the offender had spent undertaking residential rehabilitation programs. James J referred to evidence of the strict discipline expected of people who entered the programs and held that 'the conditions of the residential programs in which the [offender] was participating amounted to conditions of quasi-custody'.[86] James J said the following:

> If the [offender] was participating in programs the conditions of which amounted to conditions of quasi-custody, then the [offender] should not, in my opinion, be disentitled from obtaining a credit in sentencing, by reason of the circumstance that part of his motivation for undertaking the programs might have been to create a favourable impression at any sentence hearing. The [offender's] motive for undertaking the programs might be relevant in the assessment of the applicant's prospects of rehabilitation but in my view it is not relevant in determining whether he should be entitled to some credit in sentencing, on the basis that he has already undergone a kind of punishment by being subjected to quasi-custody.[87]

188 In *Renshaw v The Queen*,[88] Hoeben JA (with whom RS Hulme J and Fullerton J agreed) said the following about the sentencing judge's approach to the time spent by the offender in 'quasi-custody':

> The [offender's] attendance at the rehabilitation centre, gave rise to two issues: Firstly, the positive effect of the rehabilitation and secondly, the time actually spent at the rehabilitation centre. His Honour specifically took into account the first of those issues, but made no mention of the second. I infer that because it was not expressly drawn to his attention and because he failed to make any reference to it, that his Honour did not take that matter into account.
>
> His Honour's failure to take this matter into account did constitute error.[89]

83 Ibid [25].

84 (2003) 59 NSWLR 1.

85 Barr J disagreed with the majority as to the result but agreed with James J that the sentencing judge erred in refusing to take into account the time the offender had spent in residential programs.

86 *Delaney* (2003) 59 NSWLR 1, 6 [22].

87 Ibid 6 [23].

88 [2012] NSWCCA 91.

89 Ibid [28]–[29].

189 The approach of the New South Wales Court of Criminal Appeal in taking account of the time spent by an offender in a rehabilitation facility is to backdate the commencement date of his or her sentence.[90]

190 A similar approach has been adopted in the Australian Capital Territory. In *R v Eyles (No 3)*,[91] Refshauge ACJ noted that the Supreme Court of the Australian Capital Territory 'regularly recognises that time spent in specialist residential drug rehabilitation and other confinement, can be wholly or partly taken into account.'[92] Refshauge ACJ stated the following:

> The courts have variously allowed from one-half to the full amount of time spent in full time residential rehabilitation, especially with programs that are more rigorous such as, for example, the Odyssey House Program, to count as relevant to sentence.[93]

191 In our opinion, subject to the observations that follow, the approach adopted in New South Wales and the Australian Capital Territory is correct and it should be followed in Victoria. Such an approach will also promote comity with the courts of other Australian jurisdictions. That approach, adapted in the manner discussed below, will require Victorian sentencing courts to give greater emphasis than in the past to the punitive element of residency in a rehabilitation facility such as Odyssey House.

192 As has been demonstrated in the present case, residency at a rehabilitation facility has the potential to significantly assist an offender's rehabilitation. In particular, such residency may assist an offender to overcome drug dependency and other factors that have contributed to his or her offending and to develop strategies for becoming a law abiding citizen. These outcomes benefit not only the offender but also the community. It is in the interests of the community for offenders — particularly young offenders — to reform and make positive contributions to the community rather than spend their lives in and out of prison for increasingly more serious

90 Ibid [34]; *Hughes v The Queen* (2008) 49 MVR 420, 426 [38] citing *R v McHugh* (1985) 1 NSWLR 588, 590–1.

91 [2017] ACTSC 1.

92 Ibid [103] citing *R v Elphick (No 2)* [2015] ACTSC 23 [86]–[90].

93 *Eyles* [2017] ACTSC 1 [105].

offending.

193 The evidence in the present case indicates that residency at Odyssey House involves significant restrictions on the liberty of those undertaking the treatment offered by that facility. It is likely that other rehabilitation facilities impose similar restrictions. However, the nature and severity of the restrictions and the treatment programs on offer may vary as between different facilities. Where reliance is placed on residency at such a facility, evidence will be required to establish that it is appropriate for the Court to give credit for such residency. It will be relevant for the court to know whether the residency is entirely voluntary or whether there is an element of compulsion as in the present case, where residence at Odyssey House was a condition of the applicant's bail. Of course, voluntary residency will continue to be relevant to the instinctive synthesis in other ways.

194 According to the evidence of Mr Smithers, there is a significant 'drop out' rate among Odyssey House residents, with only 10 to 20 per cent of them progressing through to the third stage of the treatment program.[94] Those who complete all stages of the program have a good chance of adopting a positive value system that can equip them to cope with the vicissitudes of life without reverting to unlawful or anti-social behaviour.

195 Self-evidently, it is in the community's interest that offenders — particularly young offenders with substance abuse problems — seek assistance from residential rehabilitation facilities and complete the rigorous treatment programs that they offer. Offenders will be encouraged to seek residential treatment if it is understood that sentencing judges will acknowledge, and give credit for, the punitive nature of residency in such a facility. The extent of that credit will depend on the circumstances of each case, including the nature and severity of the restrictions to which an offender has been subject and the duration of the offender's residency. Clearly, the period of residency must post-date the commission of the offences for

[94] Transcript of Proceedings, *DPP v Akoka* (County Court of Victoria, CR 16-00186, Judge Chettle, 7 February 2017) 88.

which the offender is being sentenced. Further, a period of residency cannot be doubly credited. Thus, where the offender is sentenced on different occasions for separate offences following a period of residency, credit for that period can be given on only one of those occasions.

196 The credit referred to at [195] above will, as with all other sentencing discounts, form part of the application of the instinctive synthesis without being numerically identified. However, as with other significant sentencing considerations, a sentencing judge should ordinarily explain how the punitive nature of residency at a rehabilitation facility has informed — in terms of the weight assigned to it — the instinctive synthesis.

197 Although residency at a rehabilitation facility has punitive elements, credit for it cannot be given in the same way as pre-sentence detention. Pre-sentence detention involves time spent in custody and, in accordance with s 18(1) of the *Sentencing Act 1991*, it must be deducted from a custodial sentence in a precise mathematical manner for the entire period the offender has spent in detention.[95] On the other hand, residence at a rehabilitation facility, no matter how restrictive and punitive, is not equivalent to time spent in custody.[96] It will not ordinarily result in a deduction of the entire period of residency from a custodial sentence.

198 For these reasons, residency at a rehabilitation facility is also different in nature to *Renzella* time. Although *Renzella* time is actual time spent in custody, it falls outside s 18 of the *Sentencing Act 1991*. As *Renzella* time is real incarceration it will usually be given greater weight than time spent in a residential rehabilitation facility.

199 In the present case, the judge acknowledged that the applicant's residency at Odyssey House for nearly 12 months had a punitive element as well as a rehabilitative element and stated that he had taken both elements into account. However, while the judge devoted several paragraphs of his sentencing remarks to discussing the

[95] This is so unless the Court 'otherwise orders'.

[96] *Eastway* (Unreported, New South Wales Court of Criminal Appeal, 19 May 1992) 6. See [184] above.

rehabilitative element, his discussion of the punitive element was confined to a single sentence explaining why he fixed a shorter than usual non-parole period.[97]

200 It is not entirely clear whether the judge confined his consideration of the punitive element to the non-parole period, but the sentencing remarks, read as a whole, indicate that he misapprehended the real significance of this element. Moreover, until now, there has been no focus in Victoria upon how the punitive aspect of restrictive residency should be treated. Had the judge appreciated the full impact of the restrictive nature of the applicant's residency and how it should inform the exercise of his sentencing discretion, there would no doubt have been reference made to it in the sentencing remarks. It was necessary that it be indicated that the restrictive residency had resulted in a lowering of both the head sentence and the non-parole period.

201 For the above reasons, the judge fell into error and the sentencing discretion has been vitiated. Accordingly, Ground 2 is made out.

Ground 3: Manifest excess

Parties' submissions on Ground 3

202 The applicant submitted that the individual sentences and orders for cumulation resulting in a total effective sentence of six years' imprisonment, as well as the non-parole period of three years, are manifestly excessive in the light of the following matters:

(a) He pleaded guilty at a relatively early stage in respect of the first indictment, and at a late stage in respect of the second indictment in circumstances which did not indicate a lack of remorse. He was entitled to a significant discount for the utilitarian benefit of his pleas.

(b) He expressed genuine remorse and empathy for his victims.

[97] See [143] above.

(c) Mr Irvine's supportive victim impact statement.[98]

(d) His youth meant that rehabilitation was an important sentencing factor and raised the benchmark for the gravity of offending which would justify adult imprisonment.[99]

(e) His offending and criminal history were intrinsically linked with his drug addiction. In the 12 months prior to sentence he achieved what can only be described as spectacular rehabilitation from his drug addiction, thereby reducing the need for the sentence to give effect to general and specific deterrence and the protection of the community, and also warranting the exercise of mercy.

(f) The 12 months he had spent undertaking the Odyssey House residential rehabilitation program were onerous, and constituted quasi pre-sentence detention or additional punishment in respect of which he was entitled to credit.

(g) A CCO with conditions tailored to addressing his risk factors could be onerous and amount to a significant punishment, as well as achieving specific and general deterrence, and the protection of the community through his quasi-detention and ultimate rehabilitation.

(h) Imposing a CCO with conditions regarding drug treatment would also operate as a powerful incentive for him to continue to abstain from drugs. Were he to breach the CCO, he would fall to be re-sentenced by the County Court for the original offending, in addition to being sentenced for contravening the CCO itself.

(i) The attitude of his mother (whose support he retains) is a further protective factor mitigating the risk that he might relapse and re-offend.

(j) He is intelligent and previously studied at university, before dropping out due to his drug addiction and other matters and has the potential to be a contributing member of society. That potential decreases the longer that he is

[98] See [132] above. The applicant referred to *Mok v The Queen* [2011] VSCA 38 [12]–[16].

[99] The applicant relied on *R v Mills* [1998] 4 VR 235, 241.

in prison, particularly given the assessment of Mr Newton that he is highly influenced by his peers.

203 The Crown submitted that the sentences imposed on the applicant were reasonably open and that the judge had regard to each of the matters set out at [202] above. The Crown accepted that the judge had not specifically addressed the deterrent effect of a CCO but submitted that it was open to the judge to have little regard to such a factor given the applicant's history of breaching them.

204 The Crown contended that the armed robbery and the aggravated burglary were serious examples of those offences and emphasised the factors contributing to the gravity of them. These were said to include that the applicant: threatened and stole from people in their own home at night; carried weapons and repeatedly threatened to use them; and threatened to kill or seriously injure the occupants.

Decision on Ground 3

205 As our decision to uphold Ground 2 has the effect of re-opening the sentencing discretion, it is not necessary for us to consider Ground 3. However, we wish to make two brief comments on the parties' submissions in relation to Ground 3. First, in so far as the applicant blamed his offending on his addiction to methylamphetamine, little, if any, weight can be placed on that matter. This Court has stated on numerous occasions that, save for the most exceptional circumstances, 'drug addiction provides scant excuse for offending' and will be of 'only slight mitigatory significance'.[100] Secondly, as discussed below, we have been persuaded that the cumulative effect of the mitigating factors upon which the applicant relied warranted greater weight than the judge apparently accorded to them.

Resentencing

206 Having found that there is an error in the sentence imposed by the judge, s 281(1)(b) of

[100] *R v Djeri* [2006] VSCA 195 [13]. See also *R v Grossi* (2008) 23 VR 500 , 515–16 [53].

the *Criminal Procedure Act 2009* requires this Court to consider whether a different sentence should be imposed.

207 In order to assist this Court in determining this issue, the applicant relied on two letters which post-dated the sentence imposed by the judge. The first letter, which was dated 25 July 2017, was from Mr Kiridis, a senior therapist at Odyssey House. He stated that Odyssey House would be happy to accept the applicant back into its treatment program. The second letter, which was dated 12 July 2017, was from Mr Wise, a Deputy Commissioner of Corrections Victoria. He stated that a psychology unit was removed from the applicant's distance education course because of his low prospects of obtaining employment in that field due to his criminal record.

208 Having regard to the above letters and the matters that were before the judge on the plea, we have determined that a more moderate sentence should be imposed on the applicant than the sentence imposed by the judge. In forming this view, we have given separate and distinct consideration — and substantial weight — to the punitive nature of the applicant's residency at Odyssey House. We have also given more weight than the judge apparently did to the cumulative effect of the other mitigating circumstances upon which the applicant relied under Ground 3, including, in particular, his guilty pleas, his youth, his remorse and the progress he has made in his rehabilitation. However, for the reasons discussed under Ground 1, a CCO or a combination sentence[101] are not appropriate sentencing dispositions in the present case.

209 In all the circumstances, the applicant will be resentenced in accordance with the following table:

210 Indictment F12535371	**211 Offence**	**212 Maximum**	**213 Sentence**	**214 Cumulation**

[101] It is not necessary for us to determine whether, if a combination sentence were to be imposed, such a sentence would be governed by s 44(1) of the *Sentencing Act 1991* in its present form or in the form it was in when the applicant was sentenced on 10 February 2017.

215	216 Armed robbery	217 25 years	218 18 months	219 Base
220 221	222 Theft	223 10 years	224 12 months	225 6 months
226	227 Make threat to kill	228 10 years	229 6 months	230 -
231	232 Obtain financial advantage by deception	233 10 years	234 7 days	235 -
236 Total Effective Sentence Indictment F12535371:		237 2 years		
238 **Other relevant orders:** 9 months of the sentence on this indictment be served cumulatively upon the sentence on indictment G10077355.1.				

239 Indictment G10077355.1	**240 Offence**	**241 Maximum**	**242 Sentence**	**243 Cumulation**
244	245 Trafficking in a drug of dependence	246 15 years	247 18 months	248 9 months
249	250 Aggravated burglary	251 25 years	252 42 months	253 Base
254	255 Make threat to inflict serious injury	256 5 years	257 9 months	258 -
259	260 Theft	261 10 years	262 6 months	263 -
264	265 Obtain financial advantage by deception	266 10 years	267 1 month	268 -
269	270 Handle stolen goods	271 15 years	272 3 months	273 -
274 Total Effective Sentence Indictment		275 4 years and 3 months		

G10077355.1	

276 Total Effective Sentence (both indictments):	277 5 years
278 Non-Parole Period:	279 2 years and 6 months

280 Pursuant to s 6AAA of the *Sentencing Act 1991*, a declaration will be made that, but for the applicant's plea of guilty, we would have sentenced him to a total effective sentence of 7 years with a non-parole period of 4 years and 6 months.